

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TED MARCUM,)
Petitioner-Appellant,)
v.)
OHIO ADULT PAROLE AUTHORITY,)
Respondent-Appellee.)

FILED
Jun 25, 2008
LEONARD GREEN, Clerk

O R D E R

Ted Marcum, a pro se Ohio prisoner, appeals a district court's orders: (1) denying his petition for a writ of habeas corpus under 28 U.S.C. § 2254; and (2) denying his motion for relief from judgment under Fed. R. Civ. P. 60. Marcum's notices of appeal have been construed as applications for a certificate of appealability. *See* Fed. R. App. P. 22(b). Marcum also moves to proceed in forma pauperis on appeal.

A jury convicted Marcum of assaulting a police officer with a specification of a prior offense of violence, defrauding a livery with a specification of a prior offense of violence, disorderly conduct, and resisting arrest. Marcum moved to vacate or correct his sentence; the trial court denied the motion. Marcum appealed. The Ohio Court of Appeals affirmed his convictions. *State v. Marcum*, No. CA96-03-049, 1996 WL 732453 (Ohio Ct. App. Dec. 23, 1996) (unpublished). The Ohio Supreme Court denied Marcum leave to appeal. *State v. Marcum*, 677 N.E.2d 814 (Ohio 1997). Thereafter, Marcum moved the Ohio Court of Appeals for an enlargement of time to file a motion to reopen. The Ohio Court of Appeals denied the motion. Marcum then moved the Ohio Court of Appeals for leave to file a supplemental brief. The Ohio Court of Appeals denied the motion and the Ohio Supreme Court dismissed his appeal. *State v. Marcum*, 705 N.E.2d 365 (Ohio 1998).

Marcum then filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254. The district court dismissed the petition without prejudice for Marcum's failure to completely exhaust his state

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remedies. The Ohio Court of Appeals denied Marcum's subsequent motion to reopen. *State v. Marcum*, No. CA96-03-049, 2002 WL 42894 (Ohio Ct. App. Jan. 14, 2002) (unpublished). The Ohio Supreme Court denied Marcum leave to appeal. *State v. Marcum*, 766 N.E.2d 1003 (Ohio 2002).

Marcum then filed the instant petition for a writ of habeas corpus, alleging seven grounds for relief. The State of Ohio opposed Marcum's habeas petition, asserting that his grounds were time-barred, procedurally defaulted, and/or lacked merit. A magistrate judge recommended that Marcum's habeas petition be denied. Over Marcum's objections, the district court denied his habeas petition and denied him a certificate of appealability. Marcum appealed, No. 07-4068.

Marcum also filed a motion for relief from judgment under Fed. R. Civ. P. 60. The district court denied Marcum's motion for relief from judgment, but issued a certificate of appealability on the issue of the adequacy of Ohio R. App. P. 26(B), in light of the distinction between this court's holdings in *Franklin v. Anderson*, 434 F.3d 412 (6th Cir. 2006), and *Williams v. Bagley*, 166 F. App'x 176 (6th Cir. 2006). The district court also granted Marcum in forma pauperis status on appeal. Marcum appealed, No. 07-4414. This court consolidated the briefing schedule in Nos. 07-4068 and 07-4414.

Marcum now applies to this court for a certificate of appealability from the denial of his habeas petition and a partial certificate of appealability from the denial of his Rule 60 motion. To obtain a certificate of appealability, an applicant must make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). To satisfy this standard, a petitioner must demonstrate "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Additionally, "[w]here a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further." *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Upon consideration, the court concludes that jurists of reason could not

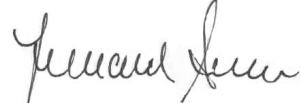
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disagree with the district court's resolution of Marcum's grounds, with the exception of the issue upon which it granted Marcum a certificate of appealability.

For the foregoing reasons, Marcum's application for a certificate of appealability in No. 07-4068 is denied, his application for a partial certificate of appealability in No. 07-4414 is denied, and his motions to proceed in forma pauperis are denied as moot. The Clerk's Office is directed to enter a briefing schedule only as to the issue certified by the district court in No. 07-4414: whether Ohio R. App. P. 26(B) is an adequate and independent state ground precluding federal habeas review.

ENTERED BY ORDER OF THE COURT



Leonard Green
Clerk